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No. 93-1571

In The

Supreme Court of the United States

October Term, 1993

ELIZABETH QUTB, et al.,

Petitioners,

vs.

STEVE BARTLETT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that the City of Dallas' juvenile curfew ordinance did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and was narrowly tailored to achieve the compelling state interest of reducing juvenile crime and victimization?

2. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that the Dallas juvenile curfew ordinance did not violate any First Amendment right of association?

3. Did the United States Court of Appeals for the Fifth Circuit apply the correct legal standard in holding that the Dallas juvenile curfew ordinance did not violate any fundamental right to privacy?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 2

STATEMENT OF THE CASE 2

A. COURSE OF PROCEEDINGS AND DISPOSITION 2

B. STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 5

ARGUMENTS SUPPORTING DENIAL OF THE WRIT 6

I. THE STANDARDS FOR REVIEW HAVE NOT BEEN MET BY PETITIONERS 6

II. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 9

III. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY GENERALIZED RIGHT OF SOCIAL ASSOCIATION 13

IV. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY FUNDAMENTAL RIGHT TO PRIVACY 14

V. THERE IS NO ISSUE OF PRIOR RESTRAINT IN THIS CASE 14

TABLE OF CONTENTS – Continued

Page

VI. COURTS HAVE CONSISTENTLY UPHELD ORDINANCES THAT ARE NARROWLY TAILORED 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

A. CASES

Allen v. City of Bordentown, 524 A.2d 478 (Super. Ct. N.J. 1987) 16

Alves v. Justice Ct. of Chico Judicial Dist., 306 P.2d 601 (Ct. App. Cal. 1957) 16

Braxton v. U.S., 500 U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991) 7

Brown v. Ashton, 611 A.2d 599 (Md. 1992) 16

Bykofsky v. Borough of Middletown, 401 F.Supp. 1242 (M.D. Penn. 1975), *aff'd*, 535 F.2d 1245 (3rd Cir. 1976), *cert. denied*, 429 U.S. 964 ..... 8, 15

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 9

City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992) 16

City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988) 16

City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989) 15

City of Richmond v. Croson, 488 U.S. 469 (1989) 11

City of Seattle v. Pullman, 514 P.2d 1059 (Wash. 1973) 17

City of Wadsworth v. Owens, 536 N.E.2d 67 (Wadsworth Mun. Ct. Ohio 1987) 16

Dunnigan v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983) 12

Ginsberg v. New York, 390 U.S. 629 (1968) 12

TABLE OF AUTHORITIES – Continued

Page(s)

Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) 10

Hayes v. Mun. Court of Oklahoma City, 487 P.2d 974 (Ct. Crim. App. Okla. 1971) 16

Hodgson v. Minnesota, 497 U.S. 417 (1990) 10

In re Doe, 513 P.2d 1385 (Ha. 1973)..... 16

Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981).....7, 8, 9, 16

K.L.J. v. State, 581 So.2d 920 (Fla. App. [1st Dist.] 1991)..... 17

McCollester v. City of Keene, 586 F.Supp. 1381 (D.N.H. 1984) 17

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) 15

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 10

People in Interest of J.M., 768 P.2d 219 (Colo. 1989) 15

People v. Walton, 161 P.2d 498 (Cal. 1945)..... 15

Plyler v. Doe, 457 U.S. 202 (1982)..... 10

Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993)..... *passim*

Stanglin v. City of Dallas, 490 U.S. 19 (1989)..... 13

Thistlewood v. Ocean City, 204 A.2d 688 (Md. 1964)..... 16

Village of Deerfield v. Greenberg, 550 N.E. 2d 12 (Ill. 1990)..... 16

W.J.W. v. State, 356 So.2d 48 (Fla. App. [1st Dist.] 1978)..... 17

Waters v. Barry, 711 F.Supp. 1125 (D.D.C. 1989)..... 16

TABLE OF AUTHORITIES – Continued

Page(s)

B. STATUTES AND RULES

28 U.S.C. § 1254(1) 2

SUP. CT. R. 10.1(a) and (c) 5, 6, 7, 8

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents Bartlett, Lipscomb, Luna, Garcia, Tandy, Duncan, Hicks, Nash, Mayes, Box, Halstead, Fielding, Wells, Bartos, Palmer, Hart, Rathburn, and the City of Dallas file this Brief in Opposition to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Response"), asking the Court to deny the Petition for Writ of Certiorari ("Petition") to review the opinion issued November 19, 1993, by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondents respectfully show the Court as follows:

JURISDICTION

The Court's jurisdiction of this appeal is based on the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered November 19, 1993. Petitioners' petition for panel rehearing was denied by the Fifth Circuit on January 4, 1994. This Court has jurisdiction to review the judgment of the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

Petitioners' statement is essentially correct; however, Respondents have not agreed to delay enforcing the ordinance. An agreement to delay enforcement was in effect until the trial court ruled on the constitutionality of the ordinance. After the Fifth Circuit ruled the ordinance constitutional in November of 1993, Petitioners filed a motion to stay the issuance of the mandate and a motion to recall the mandate for the purpose of staying enforcement of the ordinance. Both motions were denied.

Additionally, Petitioners' statement that the City of Dallas on appeal contended that it produced sufficient data to justify the ordinance under the "rational basis" test is incorrect. Respondents have always contended that the data produced was not only sufficient under the "rational basis" test, but also under the "strict scrutiny" test.

B. STATEMENT OF FACTS

On June 12, 1991, in response to citizens' demands for protection of the city's youth, the Dallas City Council enacted a juvenile curfew ordinance. This ordinance prohibits persons under seventeen years of age from remaining in a public place or establishment from 11 p.m. until 6 a.m. on week nights, and from 12 midnight until 6 a.m. on weekends. As defined by the ordinance, a "public place" is any place to which the public or a substantial group of the public has access, and includes streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. "Establishment" is defined as "any privately-owned place of business operated for a profit to which the public is invited, including but not limited to any place of amusement or entertainment."

Although the ordinance restricts the hours when minors are allowed in public areas, the ordinance also contains a number of exceptions or defenses. A person under the age of seventeen in a public place during curfew hours does not violate the ordinance if he or she is accompanied by a parent or guardian, or is on an errand for a parent or guardian. Likewise, minors would be allowed in public places if they are in a motor vehicle traveling to or from a place of employment, or if they are involved in employment related activities. Affected minors could attend school, religious, or civic organizational functions – or generally exercise their First Amendment speech and associational rights – without violating the ordinance. Further, it is not a violation to engage in interstate travel, or remain on a sidewalk in front of the minor's home, or the home of a next door neighbor.

Additionally, the ordinance places no restrictions on a minor's ability to move about during curfew hours in the case of an emergency. Finally, the ordinance does not apply to persons under seventeen years of age who are married, have been married, or have had the disabilities of minority removed in accordance with Chapter 31 of the Texas Family Code.

A minor violates the curfew if he or she remains in any public place or on the premises of any establishment during curfew hours, and if the minors' activities are not exempted from coverage. If a minor is apparently violating the ordinance, the ordinance requires police officers to ask the age of the apparent offender, and to inquire into the reasons for being in a public place during curfew hours before taking any enforcement action. An officer may issue a citation or arrest the apparent offender only if the officer reasonably believes that the person has violated the ordinance and that no defenses apply. If convicted, an offending party is subject to a fine not to exceed $500 for each separate offense.

Like minors who have violated the offense, a parent of a minor, or an owner, operator or employee of a business establishment is also subject to a fine not to exceed $500 for each separate offense. A parent or guardian of a minor violates the ordinance if he or she knowingly permits, or by insufficient control allows, a minor child to remain in any public place or on the premises of any establishment during curfew hours. An owner, operator or employee of a business establishment commits an offense by knowingly allowing a minor to remain upon the premises of the establishment during curfew hours. An owner, operator or employee of a business is

exempted from the ordinance if that person promptly notifies the police department that a minor is on the premises and refuses to leave.

For ease of reading and to avoid repetition, statistical information regarding juvenile crime is set forth in Section II of this Response.

SUMMARY OF ARGUMENT

The Fifth Circuit's legal analysis regarding the City of Dallas' teen curfew ordinance applies the correct precedent. Petitioners have not met the standard for review which would allow the Court to invoke its discretionary review pursuant to Supreme Court Rule 10.1.

The ordinance in question satisfies the strict scrutiny test and is narrowly tailored to accomplish the stated objectives of the ordinance. Therefore, no denial of equal protection of the law exists.

Petitioners contend that the ordinance infringes upon the right to associate. There is, however, no generalized right of association. This argument, therefore, is without merit.

Petitioners contend that the ordinance violates their right of privacy. This argument is without merit because the ordinance at most is a minimal intrusion into Petitioners' rights. Moreover, this minimal intrusion is significantly outweighed by the compelling state interest advanced.

Petitioners contend that the ordinance is, in effect, a prior restraint. This is incorrect because Petitioners misapply the doctrine of prior restraint. There is no imposition of a restraint prior to publication.

Finally, the City's ordinance is not overly broad, but is narrowly drawn to advance the stated objective. The ordinance, therefore, is constitutional.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE STANDARDS FOR REVIEW HAVE NOT BEEN MET BY PETITIONERS.

In vague and conclusory fashion, Petitioners assert that the Court's discretionary review powers are appropriately engaged by the Fifth Circuit's ruling vis-a-vis other courts' decisions, under Supreme Court Rule No. 10.1. *See* Petitioners' Petition, pp. 6-9. Petitioners' contentions are without merit, and the Court should deny discretionary review in the matter.

Supreme Court Rule 10.1 states in relevant part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or . . .

> (c) When a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . .

SUP. CT. R. 10.1(a) and (c). As the Court recently held, the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385, 391 (1991). Petitioners' failure to satisfy this standard should necessarily result in the Court's denial of their Petition.

In an attempt to establish that the Fifth Circuit's opinion conflicts with decisions of state courts of last resort, Petitioners cite several state court decisions striking various curfew or similar ordinances as unconstitutional. Petitioners' argument is misplaced. All of the cases cited by Petitioners that struck curfew ordinances did so because the ordinances were not narrowly drawn, but were overly broad. *See* Petition for Writ of Certiorari, pp. 6-8. In fact, the Fifth Circuit, in *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981), struck an ordinance under the overbreadth doctrine because it contained few exempted activities. The Fifth Circuit, however, expressly reserved its opinion to the ordinance presented in that case and did not express an opinion on the validity of a curfew ordinance narrowly drawn to accomplish proper social objectives. *Johnson v. City of Opelousas*, 658 F.2d at 1072. The ordinance under consideration in this case is narrowly drawn and does not suffer from overbreadth. Although the district court held the

City of Dallas' ordinance unconstitutional, " . . . constitutional overbreadth [was] not one of [the ordinance's problems]." *See* District Court Opinion dated August 10, 1992, p. 20, n.36. Had the ordinance at issue not been narrowly drawn, the Fifth Circuit most certainly would have struck it in accordance with the overbreadth doctrine enunciated in *Johnson v. City of Opelousas.*

Since the ordinance was not found to be overbroad by either the district court or the court of appeals, none of the cases cited by Petitioners establishes the requisite conflict necessary to confer the Court's discretionary review under Supreme Court Rule 10.1. Petitioners' cited cases are not relevant to the Fifth Circuit's opinion herein, and the Petition should be denied.

Petitioners also contend that the Fifth Circuit's decision conflicts with other state and federal court decisions sufficient to establish jurisdiction under Rule 10.1. *See* Petitioners' Petition, pp. 9-16. Petitioners' argument, once again, misses the mark. Rule 10.1 specifically calls for review of conflicts "with a state court of last resort"; any attention to lesser state appellate decisions is not sanctioned. Further, Petitioners' attempt to rely upon federal district court cases as creating the necessary conflict does not comply with the provisions of Rule 10. Not a single circuit case is cited by Petitioners. The only federal appellate courts which have reviewed curfew ordinances held them to be constitutional. *See Qutb v. Strauss,* 11 F.3d 488 (5th Cir. 1993); and *Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242 (M.D. Penn. 1975), *aff'd,* 535 F.2d 1245 (3rd Cir. 1976), *cert. denied,* 429 U.S. 964. Since there is no conflict among the various federal circuit courts of appeals,

no basis exists for this Court to exercise discretionary jurisdiction.

Finally, Petitioners argue that this case presents an important question of federal law which should be settled by this Court. Since the federal appellate courts that examined narrowly drawn curfew ordinances, as is the ordinance under consideration, have found them constitutional, no federal law question of such importance is presented. As the Fifth Circuit's opinion aptly demonstrates, narrowly drawn and specific ordinances pass constitutional muster; overbroad ordinances (such as was considered by the Fifth Circuit in *Johnson v. City of Opelousas*) are unconstitutional. For these reasons, Petitioners have failed to establish entitlement to the Court's exercise of discretionary jurisdiction by a writ of certiorari, and have failed to establish the requisite standard for review by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

II. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners contend that the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it allegedly makes an impermissible classification between persons under seventeen years of age and those over seventeen years of age. Under the Equal Protection Clause, the Constitution requires that all persons who are similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center,*

Inc., 473 U.S. 432, 439 (1985). If a distinction affects a "suspect class" or infringes upon a fundamental right, the legislation is subject to strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). A classification based on age is not a suspect category. *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2406 (1991). Petitioners, however, contend that the curfew infringes upon the fundamental right to move about freely in public, and is thus subject to strict scrutiny. An ordinance which sets up a classification can survive strict scrutiny if it promotes a compelling state interest and is narrowly tailored to achieve that interest. *Plyler v. Doe*, 457 U.S. at 216-17. The Fifth Circuit, for the purpose of its analysis assumed, without deciding, that the right to move about freely is a fundamental right. Respondents do not agree that minors have a fundamental right to move about and stroll at all hours of the night. Petitioners would cite *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), for the proposition that minors have a fundamental right to move about, loiter or stroll at anytime during the night. This is incorrect. *Papachristou* stands for the proposition that adults, **not minors,** have a fundamental right to loiter, wander, stroll and move about freely in public.

This Court has recognized that the government has "a strong interest in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). Petitioners conceded that the City of Dallas had a compelling interest in reducing juvenile crimes. The Fifth Circuit, in *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993), held that the City of Dallas had a compelling interest in

reducing juvenile crime and victimization, which would promote juvenile safety and well-being. An ordinance is narrowly tailored if there is a nexus between the state's interest and the classification created by the ordinance. *City of Richmond v. Croson*, 488 U S. 469, 493 (1989).

The Fifth Circuit further held that the City of Dallas provided sufficient statistics to establish that the classification created by the ordinance "fits" the government's compelling interest. *Qutb* at 493. The statistical information relied upon by the court was the following:

1. Juvenile crime increases proportionally with age between ten years old and sixteen years old.
2. In 1989, Dallas recorded 5,160 juvenile arrests, while in 1990 there were 5,425 juvenile arrests. In 1990 there were forty murders, ninety-one sex offenses, 233 robberies, and 230 aggravated assaults committed by juveniles. From January 1991 through April 1991, juveniles were arrested for twenty-one murders, thirty sex offenses, 128 robberies, 107 aggravated assaults, and 1,042 crimes against property.
3. Murders are most likely to occur between 10:00 p.m. and 1:00 a.m. and most likely to occur in apartments and apartment parking lots and streets and highways.
4. Aggravated assaults are most likely to occur between 11:00 p.m. and 1:00 a.m.
5. Rapes are most likely to occur between 1:00 a.m. and 3:00 a.m., and sixteen percent (16%) of rapes occur on public streets and highways.
6. Thirty-one percent (31%) of robberies occur on streets and highways.

Qutb at 493. Also before the Fifth Circuit was the stipulated evidence of the parties that of 494 juvenile arrests during curfew hours from January 1, 1992, to May 31, 1992, 316 of the 494 offenses occurred in public places. The Fifth Circuit, however, did not find it necessary to rely on these statistics, the number of juvenile arrests (offenses) in the City of Dallas in 1991 (6,336), the 2,660 juvenile arrests in the City of Dallas from January 1, 1992, to May 31, 1992 or the anecdotal evidence from police officials in its decision, since the evidence previously set forth was deemed to be sufficient.

The Court of Appeals reached this conclusion in spite of the City's inability to provide precise data regarding the number of juveniles who commit crimes in public places during curfew hours. The statistical information it relied on necessarily established the increase in juvenile crime and that a substantial number of major crimes – murder, robbery, rape and aggravated assault – occur in public places during curfew hours. To have required the City to provide precisely the number of juvenile crimes in public places during curfew hours before a juvenile curfew ordinance could have been enacted would have produced an absurd result. This Court has never required mathematically or scientifically certain criteria prior to the enactment of legislation. *Ginsberg v. New York*, 390 U.S. 629, 642 (1968); *see also Dunnigan v. City of Oxford, Mississippi*, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983).

The Fifth Circuit also found that the ordinance was narrowly tailored to accomplish its goals because it contained a number of defenses or exceptions, and stated that "the defenses are the most important consideration" in concluding that the ordinance used the least restrictive

means of accomplishing its objective. *Qutb* at 493-94. The City's curfew ordinance, because of the exceptions, had a narrow application rather than a broad application. The ordinance went no further than necessary to accomplish its goals, while at the same time respecting the rights of minors. The Fifth Circuit correctly concluded that any imposition on minors' late night activities was indeed slight in light of the City's compelling state interest in protecting juveniles and preventing juvenile crime. *Qutb* at 495. Since the correct legal analysis was applied, this Court should let the Fifth Circuit holding stand and deny the Petition.

III. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY GENERALIZED RIGHT OF SOCIAL ASSOCIATION.

Petitioners contend that the curfew ordinance infringes upon their first amendment right of association. There is, however, no "generalized right of social association." *Stanglin v. City of Dallas*, 490 U.S. 19, 25 (1989). The Fifth Circuit also concluded that if such a right existed, it was adequately protected by the exemptions provided for in the ordinance. The Fifth Circuit further and correctly concluded that any "negligible burden on the individual's right to associate" was outweighed by the compelling government interest. *Qutb* at 495 n.9. The legal analysis by the Fifth Circuit Court was correct, and the Court should not disturb its holding.

IV. THE CITY OF DALLAS' TEEN CURFEW ORDINANCE DOES NOT VIOLATE ANY FUNDAMENTAL RIGHT TO PRIVACY.

Petitioners' parents contended that the curfew ordinance infringed on their fundamental right to privacy because it allowed the state to dictate the manner in which their children would be raised. The Fifth Circuit correctly disposed of this argument in summary fashion and held that the ordinance only presented "a minimal intrusion into the parents' rights." *Qutb* at 495. The Court of Appeals emphasized the broad exemptions contained in the ordinance and the unlimited authority parents retained to make child-rearing decisions in all other aspects of their children's life. *Qutb* at 496. The only aspect of parenting that this ordinance impacts is the parents' right to permit an individual under the age of seventeen years to remain in a public place during the curfew hours without the parent, guardian or other authorized individual. The Fifth Circuit also summarily found that Petitioners' claim under the Texas Constitution was without merit and stated, "We were unable . . . to find any authority that supports the notion that the Texas Constitution would provide more protection in the area of parental privacy." *Qutb* at 496 n.10. The Fifth Circuit applied the correct legal analysis in holding that no privacy right has been violated, and its opinion should not be disturbed.

V. THERE IS NO ISSUE OF PRIOR RESTRAINT IN THIS CASE.

Petitioners contend that the curfew ordinance improperly delegates legislative and judicial power to, and vests untoward discretion in, enforcement authorities

so as to operate as a prior restraint. Petitioners misapply the doctrine of prior restraint, and their argument is without merit.

Prior restraint is the First Amendment doctrine which prohibits the imposition of a restraint on a publication before it is published. *See Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931). In this case, the ordinance does not prohibit or place any restraint on any aspect of free speech, and the Court should disregard the prior restraint argument advanced by Petitioners.

Petitioners also contend that the Dallas juvenile curfew ordinance impermissibly shifts the burden of proving the nonexistence of a free speech right and offers such untimely redress for inevitable restrictions of free speech rights in such a way as to operate as a prior restraint. Once again this argument fails because Petitioners have mischaracterized the doctrine of prior restraint. For the reasons previously stated, this argument is without merit and should be disregarded by the Court.

VI. COURTS HAVE CONSISTENTLY UPHELD ORDINANCES THAT ARE NARROWLY TAILORED.

Courts have consistently upheld ordinances that are narrowly drawn to accomplish their stated objectives. Cases which have upheld narrowly drawn teen curfews are: *Qutb v. Strauss,* 11 F.3d 488 (5th Cir. 1993); *Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242 (M.D. Penn. 1975), *cert. denied,* 429 U.S. 964 (1976); *City of Panora v. Simmons,* 445 N.W.2d 363 (Iowa 1989); *People in Interest of J.M.,* 768 P.2d 219 (Colo. 1989); *People v. Walton,* 161 P.2d

498 (Cal. 1945); *Thistlewood v. Ocean City*, 204 A.2d 688 (Md. 1964); *City of Milwaukee v. K.F.*, 426 N.W.2d 329 (Wis. 1988); and *Village of Deerfield v. Greenberg*, 550 N.E.2d 12 (Ill. 1990).

Most of the cases which have overturned curfews, with the exception of *Waters v. Barry*, 711 F.Supp. 1125 (D.D.C. 1989) and *Brown v. Ashton*, 611 A.2d 599 (Md. 1992), have done so pursuant to an overbreadth analysis because of the paucity of exempted or excepted activities. Cases which have overturned juvenile curfews for overbreadth are: *Alves v. Justice Ct. of Chico Judicial Dist.*, 306 P.2d 601 (Ct. App. Cal. 1957) (used an overbreadth analysis to determine that curfew ordinance unlawfully invaded personal rights and liberty); and *Allen v. City of Bordentown*, 524 A.2d 478 (Super. Ct. N.J. 1987) (curfew ordinance struck for vagueness and overbreadth and as violative of equal protection and fundamental right to move about, no compelling governmental interest at stake; exceptions only for emergencies and legitimate business); *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992) (striking ordinance as overbroad); *City of Wadsworth v. Owens*, 536 N.E.2d 67 (Wadsworth Mun. Ct. Ohio 1987) (striking presence ordinance as violative of right to attend religious services and right to move freely); *Hayes v. Mun. Court of Oklahoma City*, 487 P.2d 974 (Ct. Crim. App. Okla. 1971) (curfew ordinance struck under due process clause of Fourteenth Amendment for overbreadth and vagueness); *In re Doe*, 513 P.2d 1385 (Ha. 1973) (curfew ordinance struck because vague and overbroad under Fourteenth and Fifth Amendments); *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981) (striking

an ordinance with few exempted activities under overbreadth doctrine although the court stated that it did not express any opinion on the validity of a curfew ordinance narrowly drawn to accomplish proper social objectives); *K.L.J. v. State*, 581 So.2d 920 (Fla. App. [1st Dist.] 1991) (curfew ordinance struck for overbreadth because not narrowly drawn and fails to apprise persons of prohibited conduct); and *McCollester v. City of Keene*, 586 F.Supp. 1381 (D.N.H. 1984) (curfew ordinance struck for overbreadth in violation of due process clause of Fourteenth Amendment); *W.J.W. v. State*, 356 So.2d 48 (Fla. App. [1st Dist.] 1978) (curfew ordinance which did not provide for emergency exception and therefore invades personal rights and liberties); and *City of Seattle v. Pullman*, 514 P.2d 1059 (Wash. 1973) (ordinance struck for being overly broad). Therefore, since courts have consistently upheld narrowly tailored curfew ordinances as the one in question, this Court should refuse to consider this case.

CONCLUSION

None of the issues Petitioners present is of such precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits or among the circuits and state courts of last resort regarding any of the issues presented. Further, this case does not present an issue of federal law that needs to be settled by this Court. The Fifth Circuit meticulously reviewed the facts and applied the correct legal standards in reaching

its conclusions. For the reasons stated herein, this Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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